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No. 73-995

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JERROLD B. SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on two counts of having willfully failed to file his individual income tax returns for the years 1967 and 1968, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. He was sentenced to concurrent terms of one year's imprisonment and fined $1,000 on each count; all but four months of petitioner's sentence was suspended, and he was placed on probation for two years.

Petitioner contends that the trial judge should have acted *sua sponte* to strike certain of the prosecutor's comments and to refuse admission of certain testimonial evidence. Petitioner, a lawyer, was represented by counsel at trial. With one exception, no objection was

made at trial to either the comments or the evidence which petitioner challenges as prejudicial here.[1] These points therefore were not properly preserved for appellate review. *Johnson* v. *United States,* 318 U.S. 189, 200-201. The court of appeals "carefully examined the record" (Pet. App. A 17) and concluded that no "plain error" had been committed at trial. Rule 52(b), Fed. R. Crim. P. This question warrants no further review.

In any event, the prosecutor's comments and the challenged evidence were not unfairly prejudicial. Petitioner's defense at trial was that his failure to file his tax returns had not been willful. By establishing that petitioner had not paid taxes for the two years in question and commenting upon that fact, the prosecutor was merely addressing himself to that defense in a permissible fashion. See, *e.g., Lumetta* v. *United States,* 362 F. 2d 644 (C.A. 8); *United States* v. *MacLeod,* 436 F. 2d 947 (C.A. 8), certiorari denied,

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[1]Petitioner did object to the prosecutor's comment No. 11, quoted at Pet. 7. That comment, which suggested that petitioner's motive in not filing was to avoid taxes (see Tr. 522-523), was in direct response to the closing argument of petitioner's counsel that petitioner would have had no motive for a willful failure to file (Tr. 518-519). The prosecutor's comment was wholly proper in this context.

402 U.S. 907; *United States* v. *Rosenfield,* 469 F. 2d 598 (C.A. 3), certiorari denied, 411 U.S. 932.[2] Similarly, the testimony concerning petitioner's borrowings from his law firm's trust accounts was elicited to counter petitioner's contention that he had relied upon his law partner to discharge a debt to him by filing his return and paying his tax; the testimony showed that, directly contrary to petitioner's allegation, petitioner was in debt to his partner rather than *vice versa.* Moreover, there was no suggestion by the government at trial that petitioner's borrowings from the firm's trust accounts had been illegal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2]The cases cited by petitioner (Pet. 9) are distinguishable. The comments in *United States* v. *D'Anna,* 450 F. 2d 1201 (C.A. 2), were not relevant to motive; the introduction of evidence of a huge unexplained increase in net worth in *United States* v. *Walker,* 479 F. 2d 407 (C.A. 9), was prejudicial in part because the increase in net worth had stemmed principally from unrealized increases in market value and therefore had no bearing upon a motive for failing to file. The comments held to have been improper in *Dunn* v. *United States,* 307 F. 2d 883 (C.A. 5), concerned facts not in evidence; when, as here, the prosecutor's "remarks fairly construed refer only to belief based on evidence and not to an opinion formed from facts not in evidence," there is no error. *United States* v. *Schartner,* 426 F. 2d 470, 477 (C.A. 3).